No. 95-676

(4)

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Supreme Court of the United States

October Term, 1995

DOMINGO GUEVARA,

Petitioner,

v.

MARITIME OVERSEAS CORPORATION,

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

PETITIONER'S REPLY BRIEF

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Anderson, H. Edwin, III, *Fifth Circuit Symposium--Admiralty*, 41 Loyola L.Rev. 403 (1995) 6

Flynn, Stephen G., *Punitive Damages After Haslip & Miles v. Apex Marine: Allowable for Everyone But Seamen?*, 5 U.S.F. Mar.L.J. 155 (1992) 9

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Force, Robert, *The Curse of Miles v. Apex Marine Corp.: The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases*, 55 La.L.Rev. 745 (1995) 8, 9

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United Brotherhood of Carpenters and Joiners of America, *Amicus Curiae Brief In Support of Petition for Writ of Certiorari* (No. 95-676) 7, 9

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V.

MARITIME OVERSEAS CORPORATION, Respondent

On Petition for Writ of Certiorari to the
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PETITIONER'S REPLY BRIEF

Respondent's Brief in Opposition concedes the importance of the question presented,[1] the existence of a conflict among the circuits, and the desirability of uniform treatment of the issue. Furthermore, it admits that the present case is a clutter-free opportunity for deciding the

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[1]Respondent's phrasing of the Question Presented is potentially misleading in suggesting that this case centers on suits for culpable failure to provide maintenance and cure that are "brought pursuant to the Jones Act." Brief in Opposition (hereinafter "Opp.") at i. As the court below explained, the present action for denial of maintenance was not and indeed could not have been brought under the Jones Act. 59 F.3d at 1512, Pet. at D41.

issue.[2]

The opposition's effort to cast the decision below as the first major expression of an "emerging consensus"[3] that maritime employers are never to be subjected to "unliquidated punitive damages"[4] rests on a strained reading of the relevant jurisprudence.[5] Moreover, the "emerging

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[2]See Opp. at 5, n.1 (stating that the present case is a better vehicle for deciding the issue than *Glynn*, No. 95-691).

[3]Opp. at 4.

[4]See note 6, infra.

[5]For example, respondent's suggestion (Opp. at 10) that the Alaska Supreme Court will now follow the Ninth Circuit not only overlooks the truism that a state court is not bound to the maritime-law views of the Court of Appeals for the circuit in which the state is located (see Pet. at 8 & n.27). It also overlooks the following strong policy pronouncement in *Weason v. Harville*, 706 P.2d 306, 310 (Alaska 1985): "When a shipowner refuses to pay maintenance and cure the seaman's only alternative is a lawsuit, which is a lengthy and expensive process. During this time, the seaman may have no funds to effect his recovery, and thus may be forced to work when he should be resting. In addition, the shipowner might use a refusal to pay maintenance as a bargaining tool, forcing an impoverished seaman to accept a low amount or face a lengthy court battle. Thus, the availability of punitive damages will act as a deterrent to the unscrupulous employer, and will result in more speedy resolution of maintenance and cure claims." (Citations omitted).

For another example, see respondent's claims (Opp. at 8 n.12 and 9 n.13) that *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270, 1284 (CA1), *cert. denied*, 113 S.Ct. 2987 (1993), "did not endorse *Robinson*" and that *Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1127 (CA11 1995) "did not endorse *Hines*." Careful reading of the cited passages from *Ellenwood* and *Flores* belies respondent's claims. The *Ellenwood* and *Flores* courts relied on the earlier cases as settled law with no hint of disapproval.

For a third example, consider respondent's statement (Opp. at 17-18 n.21) that *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084 (CA2 1993), *cert. denied*, 114 S.Ct. 1060 (1994), holds that no admiralty plaintiff can get punitive damages. The *Wahlstrom* Court did not so hold; it merely affirmed the district court's conclusion that "because punitive damages are

consensus" argument leads respondent to a surprising misinterpretation of the decision below. That misinterpretation pervades the Brief in Opposition.

I.

THE BRIEF IN OPPOSITION MISCHARACTERIZES THE PENALTY COUNTENANCED BY THE DECISION BELOW.

In the Second and Third Circuits punitive damages--limited to attorney's fees--are awarded against employers who willfully and callously refuse to provide maintenance and cure. Respondent repeatedly claims that the decision below achieves the same resolution.[6] That claim is wrong. The court below was careful to indicate that its position differed from that of the Second Circuit: After expressing its agreement with the Ninth Circuit's decision in *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495 (CA9 1995), the court below stated:

> *Glynn* precluded the recovery of punitive damages, [whereas the Second Circuit's] *Kraljic*[7] limited punitive damages to the amount of attorney's fees....[8]

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non-pecuniary, a plaintiff has standing to seek them under the general maritime law only if having standing to seek other nonpecuniary losses." 4 F.3d at 1094, quoting 800 F.Supp. at 1066.

[6]Opp. at 6 (difference between Fifth and Second Circuit positions "nothing more than an exercise in semantics"); *id.* at 15 ("court below did not in any way restrict its holding to post-litigation activity"); *id.*, *passim* (using term "unliquidated punitive damages" throughout the brief in an apparent effort to imply that the court below has preserved the availability of punitive damages measured by attorney's fees).

[7]*Kraljic v. Berman Enterprises, Inc.*, 575 F.2d 412 (CA2 1978).

[8]59 F.3d at 1510 n. 12, Pet. at D33 n. 12.

Indeed, the court below went into considerable depth respecting the difference between its own position and that of the circuits that allow punitive damages measured by attorney's fees. The court below tied its holding to the meaning of *Vaughan v. Atkinson*, 369 U.S. 527 (1962). In its exposition of the meaning of *Vaughan*, it stated:

> *Vaughan* has come to stand for the proposition that attorney's fees can be awarded to a prevailing party when his opponent has engaged in bad-faith conduct during litigation.[9]
>
> *Vaughan* is ... a foundation of the bad-faith exception to the American Rule .... * * * A careful reading of *Chambers* ... belies the view that awards made under the bad-faith exception to the American Rule are "punitive damages" in the sense that they punish the conduct giving rise to the plaintiff's claim.[10]
>
> [A]s the [*Chambers*] Court explained, "the imposition of sanctions under the bad-faith exception depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation."[11]
>
> [F]our [*Chambers*] justices were firmly of the view that bad-faith fee-shifting may not be used to sanction pre-litigation conduct.[12]

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[9]59 F.3d at 1502, Pet. at D12.

[10]*Id.*, Pet. at D13-D14 (referring to *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991)).

[11]59 F.3d at 1503, Pet. at D14 (quoting *Chambers*, 501 U.S. at 53). Emphasis by court below.

[12]*Id.*

> "[The] bad-faith exception permits fee shifting as a sanction to the extent necessary to protect the judicial process.... When a ... court ... sanctions a party for bad-faith prelitigation conduct, it goes well beyond the exception to the American Rule...."[13]

> [T]he bad-faith exception to the American rule, of which the *Vaughan* award is cited as an example, is not a punitive award in the "tort" sense of punishing the underlying conduct that gives rise to a plaintiff's claim. Tort-like punitive damages are awarded on the basis of the merits of a case, while bad-faith fee-shifting punishes abuses of the litigation process.[14]

> According to the case law, ... the punitive aspect of the *Vaughan* award is the bad-faith exception to the American Rule, and that exception is limited to a recovery of attorney's fees. The *Vaughan* award was clearly not a punitive award in the tort sense of punishing the underlying conduct that gave rise to the litigation, and the developing case law does not support such a position.[15]

In light of all this language, respondent's claim that "the court below did not in any way restrict its holding to post-litigation activity"[16] is bewildering.

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[13]59 F.3d at 1503, Pet. at D15 (quoting the *Chambers* dissent authored by Justice Kennedy and joined by Chief Justice Rehnquist and Justice Souter, 501 U.S. at 74).

[14]*Id.*

[15]59 F.3d at 1503, Pet. at D16. Emphasis by court below.

[16]Opp. at 15.

A. Other Maritime Enterprises Disagree With Respondent's Interpretation of the Decision Below.

Significantly, other maritime enterprises emphatically disagree with respondent's reading of the decision below. In a just-published law review article by H. Edwin Anderson, III--who is the General Counsel and Contract Manager of Intermarine, Inc.--it is stated:

> While there is significant precedent to the [effect] that fee shifting is part of a court's inherent power to control the parties' conduct in litigation, an employer's willful and deliberate failure to pay maintenance and cure may occur, as it did in *Guevara*, long before the employer has been sued or litigation has commenced. Fee shifting, in that event, would appear to be punitive .... [But the *Guevara* court] noted that fee shifting in *Vaughan* was "not a punitive damages award in the tort sense of punishing the underlying conduct which gave rise to the litigation ...." In *Guevara*, *Holmes*, and like situations, the failure to pay maintenance and cure is the cause of the underlying litigation. Such fee shifting is not available under any statute and, under *Miles* [as interpreted in *Guevara*], is equally unavailable under general maritime law.[17]

Respondent's zeal to foster an "emerging consensus" has led it to read the decision below as a narrower incursion into traditional seamen's remedies than on its face it is. Petitioner's (and Mr. Anderson's) reading of the opinion below is straightforward, whereas respondent's is contrived

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[17]H. Edwin Anderson, III, *Fifth Circuit Symposium --Admiralty*, 41 Loyola L.Rev. 403, 412-13 (1995).

for present purposes.[18] Despite respondent's argument to the contrary, the decision below will foment litigation, not only because the envisaged penalty is too slight and too narrowly focused,[19] but also because any seaman's counsel who reads the decision the way petitioner (and Mr. Anderson) read it will realize that the maintenance and cure suit must be filed immediately if there is to be any chance of achieving the envisaged attorney's fees penalty.

II.

THE DISAGREEMENT OVER THE MEANING OF THE DECISION BELOW SHOWS THAT CERTIORARI SHOULD BE GRANTED.

Given the frequency with which maintenance and cure situations and potential disputes arise, the need for clear and uniform rules is apparent. The decision below has not only created a major conflict among the circuits; on the evidence of the Brief in Opposition, it has also created a significant confusion as to the scope of the envisaged attorney's fees penalty. This Court's help is needed to resolve the confusion and enable counsel for maritime employers and seamen to conduct their clients' business in a rational and responsible fashion.

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[18]If certiorari is denied and the decision below becomes law, counsel for maritime employers--including the present respondent--can be counted on to vigorously resist the imposition of any penalty for their clients' prelitigation conduct. Failure to so resist would constitute legal malpractice.

[19]Respondent's argument that the prospect of compensatory damages for aggravating a seaman's condition through withholding maintenance and cure is an adequate threat (Opp. at 19) does not reckon with Chief Judge Sobeloff's eloquent rebuttal of that claim, quoted Pet. at 27. For a view similar to Judge Sobeloff's, see the Amicus Curiae Brief filed in this action by the United Brotherhood of Carpenters and Joiners of America, pp. 5-7.

III.

IF AND WHEN SEAMEN CEASE TO MERIT THEIR TRADITIONAL TREATMENT AS WARDS OF THE ADMIRALTY, THE ANNOUNCEMENT SHOULD COME FROM THIS COURT OR CONGRESS, NOT FROM AN UNREVIEWED LOWER-COURT DECISION THAT IS DEVOID OF POLICY ANALYSIS.

Despite respondent's claim that the decision below was justified "as a matter of principle,"[20] the court below offered no policy arguments. Instead, it took the view (as respondent also notes[21]) that this Court's decisions in *Cortes*, *Vaughan*, and *Miles* "compel" the denial of punitive damages.

The flaws in the "compulsion" view are discussed in the Petition for Certiorari. See also Professor Force's thorough analysis of the *Miles* decision,[22] 55 La.L.Rev. at 762-64, 791-93 (discussing the frailty of the assumption that punitive damages are precluded in Jones Act suits, the undesirability of treating seamen worse than other maritime plaintiffs, and the implausibility and unwisdom of trying to find answers to punitive damages issues in *Miles*). See also Justice Cardozo's statement for the *Cortes* Court that "refinements of construction" should never be used to thwart the "liberal spirit" and "beneficent purpose" of the Jones Act.

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[20]Opp. at 11.

[21]*Id.*

[22]Robert Force, *The Curse of Miles v. Apex Marine Corp.: The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases*, 55 La.L.Rev. 745 (1995).

Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 375-76 (1932).

The "principle" on which respondents would rest the decision below is a two-pronged political viewpoint: delight in a perceived "national trend" against punitive damages[23] and an assertion that seamen no longer deserve or require treatment as wards of the admiralty.[24] Professor Force -- the director of the Tulane University Maritime Law Center -- is but one of a number of articulate experts who are on record with their disagreement on both prongs.[25] The present point is not the merits of these viewpoints but the obvious fact that it would be an "abdication of judicial responsibility" to allow the important matter of a seaman's entitlement to punitive damages to become settled without careful consideration of the "public policy" and "maritime safety" implications. Force, 55 La.L.Rev. at 793. Important national maritime policy should not be set by an unreviewed lower-court decision that addresses none of the policy issues at stake.

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[23]Opp. at 16.

[24]Opp. at 19.

[25]In addition to Professor Force's recent article, supra note 22, see Stephen G. Flynn, *Punitive Damages After Haslip & Miles v. Apex Marine: Allowable for Everyone But Seamen?*, 5 U.S.F. Mar.L.J. 155 (1992); *Ellenwood*, supra note 5, 984 F.2d at 1284 (discussing "a recent trend to permit punitive damages in the contract setting in a narrow range of circumstances" involving conduct meeting the culpability standard for intentional tort liability); Frank Maraist, *Introduction [to the Symposium on Emerging Issues in Maritime Law]*, 55 La.L.Rev. vii, viii, ix (1995) (stating that this Court's "somewhat cryptic decision in *Miles* ... has cast doubt upon whether maritime law will permit recovery of important elements of damages" and that Professor Force's article "may be the best analysis yet of the troubling *Miles* decision"); Brief of United Brotherhood of Carpenters and Joiners of America as Amicus Curiae in Support of Petition for Writ of Certiorari (No. 95-676) (passim).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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